

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SWINOMISH INDIAN TRIBAL  
COMMUNITY,

Plaintiff,

v.

BNSF RAILWAY COMPANY,

Defendant.

Cause No. C15-0543RSL


ORDER GRANTING IN  
PART BNSF'S MOTION TO  
EXCLUDE EXPERTS

This matter comes before the Court on "Defendant BNSF Railway Company's Motion to Exclude Expert Witnesses" Daniel Fapp and Tom Johnson. Dkt. # 144. Plaintiff has indicated that it will not be calling Mr. Johnson to testify at trial. With regards to the testimony of Mr. Fapp, BNSF argues that evidence regarding the revenue and expenses associated with the shipment of oil over the Easement is irrelevant to a determination of liability and should be excluded from the first phase of the trial. The Court disagrees. The Tribe has already shown that BNSF engaged in an intentional trespass under federal common law and is therefore liable for the damages caused by its overburdening of the easement. Dkt. # 174 at 23. The Tribe further argues, however, that the trespass was knowing, conscious, and willful, a factual issue to be decided during the first phase of the trial. The Court has already found that, in light of the

1 absence of evidence supporting BNSF's proffered justification for overburdening the easement,  
2 the promise of significant income associated with the transportation of Bakken crude oil for  
3 Tesoro/Marathon, as calculated by Mr. Fapp, is relevant to the Tribe's argument that BNSF's  
4 trespass was knowing, conscious, and willful. BNSF offers no reason to revisit that finding. Dkt.  
5 # 174 at 26. Its relevance challenge therefore fails.  
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9 For all of the foregoing reasons, BNSF's motion to exclude expert witnesses is  
10 GRANTED as to Tom Johnson and DENIED as to Daniel Fapp.  
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13 Dated this 15th day of December, 2022.  
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16 Robert S. Lasnik  
17 United States District Judge  
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